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No. 07-542

IN THE
Supreme Court of the United States

ARIZONA,
Petitioner,
v.

RODNEY JOSEPH GANT,
Respondent.

On Writ of Certiorari
to the Arizona Supreme Court

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL previously filed amicus curiae briefs in this Court in cases, like the present one, involving the automobile search-incident-to-arrest doctrine under the Fourth Amendment. *See Thornton* v. *United States*, 541 U.S. 615 (2004); *Arizona* v. *Gant*, 540 U.S. 963 (2003); *Florida* v. *Thomas*, 532 U.S. 774 (2001).

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondent has filed a global consent to *amicus* filings, and a letter of consent to the filing of this brief from petitioner has been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that police officers may search the passenger compartment of an automobile incident to the lawful custodial arrest of an occupant of the vehicle. This rule is purportedly based on protecting officer safety and preserving evidence. As it has come to be understood and applied in the vast majority of the lower courts, however, the rule is not connected to either goal. The rule also is prone to abuse, and it fails to provide predictable guidance to either officers or motorists who are arrested.

This Court should take this opportunity—consistent with the recent suggestions of several of its Justices—to reconsider and to recast the *Belton* doctrine Specifically, this Court should make clear that police officers may not conduct warrantless, exploratory searches of vehicles incident to arrests for nothing more than traffic offenses. Such a holding would flow directly from traditional Fourth Amendment principles and would ground this area of jurisprudence in actual police practices. Moreover, such a holding would provide a truly workable and easily understood rule for officers, individuals, and courts alike in the scenario that currently gives rise to the vast majority of arrests involving motorists.

ARGUMENT

A. The *Belton* Doctrine, As Understood by Most Lower Courts and Commentators, Is Unsound in Theory and Unworkable in Practice.

1. The Fourth Amendment erects a general prohibition against law enforcement officers' conducting searches without warrants. Accordingly, it has long been hornbook law that warrantless searches are allowed only under narrow and carefully guarded circumstances, and must be "strictly tied to and justified by the circumstances which rendered [their] initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (internal quotation and citation omitted). "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be [one such] strictly limited [circumstance]. It grows out of the inherent necessities of the situation at the time of the arrest." *Trupiano v. United States*, 334 U.S. 699, 708 (1948). Specifically, police officers may conduct warrantless searches incident to arrests for two reasons: (1) "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "to prevent [the] concealment or destruction" of evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

In *Chimel*, for instance, this Court held that when officers arrest someone in his home, they may search the arrestee's person and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* at 763. But the officers' authority does not extend beyond that immediate area, for there is no reason to believe that a person can

reach into "any room other than that in which an arrest occurs." *Id.*

This Court first applied this framework to vehicular searches in *New York v. Belton*, 453 U.S. 454 (1981). Perceiving the need for "a straightforward rule, easily applied, and predictably enforced," this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment"—that is, the vehicle's interior—including any containers therein. *Belton*, 453 U.S. at 459-60 (footnote omitted). Four Justices disagreed with this holding, warning that it portended "an extreme extension of *Chimel*," *id.* at 472 (White, J., dissenting), because there was "no chance" that Belton or any of the other arrestees in the case—all of whom had been removed from their car and were under police control at the time of the search—could have grabbed anything inside the car, *id.* at 468 (Brennan, J., dissenting). *See also Robbins v. California*, 453 U.S. 420, 447 (1981) (Stevens, J., dissenting) ("disagree[ing]" in *Belton*'s companion case with the *Belton* opinion), *overruled by United States v. Ross*, 456 U.S. 798 (1982). The majority emphasized, however, that the *Belton* rule "in no way alter[ed] the fundamental principles established in the *Chimel* case," but rather simply "determine[d] the meaning of *Chimel*'s principles in this particular and problematic context." *Id.* at 460 n.3.

More recently, this Court held in *Thornton v. United States,* 541 U.S. 615 (2004), that "the arrest of a suspect who is *next to* a vehicle presents identical concerns regarding officer safety and destruction of

evidence as the arrest of one who is inside the vehicle." 541 U.S. at 621 (emphasis added). Consequently, when officers arrest a "recent occupant" of a vehicle, they may search the interior of the vehicle even if the arrestee was outside his car when approached and arrested. *Id.* at 623-24.

2. The *Thornton* case, however, did not simply iron out a wrinkle in the *Belton* doctrine. It exposed the nonsensical nature of the doctrine, at least as it has come to be understood by the vast majority of lower courts and commentators (and by petitioner and its *amici* in this case). Justice Scalia, writing for himself and Justice Ginsburg, asserted that *Belton*'s apparent assumption that arrestees (such as Thornton and respondent here) who are in handcuffs while their vehicles are being searched might plausibly grab something from their vehicles "stretches [the doctrine] beyond its breaking point." *Thornton*, 541 U.S. at 625 (Scalia, J., joined by Ginsburg, J., concurring in the judgment). Justice O'Connor likewise expressed "dissatisfaction with the state of the law in this area," which she described as "a direct consequence of *Belton*'s shaky foundation." *Id.* at 624 (O'Connor, J., concurring in part). And Justice Stevens, joined by Justice Souter, bemoaned the lack of any "limiting principle" in the *Belton* doctrine that prevents officers from undertaking exploratory searches that lack any justification under *Chimel*'s safety or evidence-preservation rationales. *Id.* at 636 (Stevens, J., dissenting). The plurality did not rebut these criticisms, but rather declined to address them at that time because the petitioner had not argued that *Belton* should be recast or overruled. *Id.* at 624 n.4 (plurality opinion).

3. The vehicular search-incident-to-arrest doctrine, at least as most lower courts and commentators have derived it from this Court's precedent, suffers from three fatal flaws: (a) it generates incongruous results; (b) it is prone to abuse; and (c) it fails to provide clear guidance to police officers or anyone else.

a. The *Belton* rule is divorced from empirical reality and, therefore, leads to incongruous results. The *Belton* rule is based on the assumption that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763). But that is simply not so. As the United States conceded in *Thornton*, it is standard police procedure for officers who arrest a motorist to "restrain[]"—that is, to handcuff—"an arrestee on the scene before searching a car that he just occupied." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (quoting Br. for United States 36-37). Indeed, "[n]ot a single respondent [in a survey given to police departments] said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured." Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 676 (2002). "If it was ever true that the passenger compartment is 'in fact generally, even if not inevitably,' within the arrestee's immediate control at the time of the search, . . . it certainly is not true today." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (internal citations omitted).

Belton thus rests upon an indefensible legal fiction. As the Ninth Circuit matter-of-factly explained, when "the arrestee [i]s handcuffed and secured in a patrol car before the police conduct[] the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated." *Weaver*, 433 F.3d at 1107; *see also United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir.) (criticizing "the prevailing approach, which relies on the legal fiction that a suspect handcuffed and locked in a patrol car might escape and grab a weapon from the passenger compartment of his own car."), *cert. denied*, 546 U.S. 934 (2005); *Commonwealth v. Santiago*, 575 N.E.2d 350, 353-54 (Mass. 1991) (When "[t]he automobile was no longer within the defendant's immediate control[,] [t]here obviously was no danger that he could draw a weapon from the vehicle or attempt to conceal or destroy contraband which remained in it."). Or as Justice Scalia put it somewhat more colorfully, the notion that an arrestee handcuffed and secured in the back of an officer's squad car might nevertheless grab a weapon or evidentiary item inside another automobile "calls to mind . . . the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'" *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in the judgment) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

But instead of responding to this reality by somehow limiting the reach of the *Belton* rule, courts have tried to make sense of the searches it and *Thornton* condoned by shifting their attention from suspects' locations at the time of *searches* to their locations at the time of their *arrests*. *See Thornton*,

541 U.S. at 621-23; *United States v. Sholola*, 124 F.3d 803, 817-18 (7th Cir. 1997) (collecting decisions to this effect). So long as arrestees were "recent occupants" of vehicles at the time of their arrests, courts routinely conclude that *Belton* allows officers to search their vehicles even after the arrestees have been driven away in patrol cars, *United States v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999); *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985), and when the police have moved the arrestee's vehicle prior to the search, *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

But this shift in focus only makes matters worse. It "abandon[s] our constitutional moorings and float[s] to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring); *see also Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) ("agree[ing] entirely with that assessment"). "[W]ide-ranging exploratory searches" are exactly the kinds of searches that "the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *accord Thompson v. Louisiana*, 469 U.S. 17 (1984). And the Framers intended to do so for a fundamental reason: If there is no identifiable criterion against which to judge the reasonableness of a search, the right to be free from unreasonable searches "evaporat[es]." *Chimel*, 395 U.S. at 765.

b. Because the current doctrine is untethered to any safety or evidence-preservation concerns, it also is prone to abuse. A majority of states allows police

officers to arrest motorists for *any* traffic violation, and all states allow arrests for some such violations. *See* David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 Wake Forest L. Rev. 1287, 1335 (2005); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 250-51 nn.188-89 (1989). And this Court has recently made clear that the Fourth Amendment permits officers to make such arrests, no matter how minor the violations. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (failure to wear seatbelt); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (speeding). (Indeed, even if state law prohibits arresting a motorist for a particular traffic violation, the Fourth Amendment still allows the government to bring a prosecution based on the fruits of an arrest, and accompanying search, conducted in violation of that law. *See Virginia v. Moore,* 128 S. Ct. 1598 (2008).) Finally, the Fourth Amendment interposes no obstacle to officers' using suspected traffic violations as pretexts for stopping people who they really want to scrutinize for other reasons—whether those reasons are grounded in stereotypes, unsubstantiated hunches, or other shaky assumptions. *Whren v. United States*, 517 U.S. 806 (1996); *see also Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

The upshot of all this is that the current search-incident-to-arrest doctrine encourages officers to arrest people whom they would not otherwise arrest, in order to conduct exploratory searches they would not otherwise be allowed to conduct. When *Belton* itself was

decided, Justice Stevens observed in its companion case that:

> [U]nder the Court's new rule, [an] arresting officer may find reason to [take motorists into custody] whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.

Robbins, 453 U.S. at 452 (Stevens, J., dissenting). Time and experience has borne out this concern. It is now an accepted truth that "the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.'" *State v. Pierce*, 642 A.2d 947, 961 (N.J. 1994) (quoting 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c) (2d ed. 1987)); *accord Camacho v. State,* 75 P.3d 370, 374 (Nev. 2003); *State v. Kirsch,* 686 P.2d 446, 449 (Or. Ct. App. 1984).

One state supreme court justice, in fact, recently recounted police officers' admissions that "[t]he secret" to getting more drug seizures was pulling over motorists for "any and all [traffic] violations" (bad headlights, for example) and then "going beyond the traffic stop." *State v. Pallone*, 613 N.W.2d 568, 588 n.9 (Wisc. 2000) (Abrahamson, C.J., dissenting) (internal quotations and citation omitted). The officers did not divulge how often such arrests and searches result in

nothing more than prolonged invasions of privacy. But given that the officers, by hypothesis, lack probable cause in all of these pretextual stops to believe the drivers are guilty of any drug offense, "we must assume that a significant number of innocent persons" are included in this ongoing dragnet. *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Stevens, J., concurring in the judgment).

c. Even putting all of these problems aside, *Belton* should be reconsidered because it has failed on its own terms. This Court in *Belton* emphasized that a "highly sophisticated set of rules" in this area, "qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field." 453 U.S. at 458 (internal quotations and citations omitted); *see also Thornton*, 541 U.S. at 622-23 (emphasizing "[t]he need for a clear rule, readily understood by police officers"). Consequently, the chief virtue of the *Belton* rule is supposed to be that it provides "straightforward" and "workable" guidance to police officers and individuals alike. *Belton*, 453 U.S. at 459-60.

But in practice, the *Belton* rule generates confusion instead of dispelling it. The *Belton* rule applies to all "recent occupants" of vehicles. But this Court has advised only that "an arrestee's status as a 'recent occupant' *may* turn on his temporal *or* spatial relationship to the car at the time of the arrest *and* search." *Thornton*, 541 U.S. at 622 (emphasis added). Consequently, police officers, individuals, and courts have been "left with little guidance in determining an arrestee's status as a 'recent occupant.'" *Rainey v.*

Commonwealth, 197 S.W.3d 89, 94 (Ky. 2006), *cert. denied*, 127 S. Ct. 1005 (2007).

There is no hard-and-fast rule with respect to spatial proximity. The federal courts of appeals have been unable to reach any agreement over whether a person who is arrested beyond reaching distance from his vehicle is a recent occupant. *See United States v. Pittman,* 411 F.3d 813, 815-16 (7th Cir. 2005) (detailing split of authority on this issue). In some courts, it is utterly irrelevant "whether the occupant was [ever] actually capable of reaching the area [within the vehicle] during the course of the police encounter." *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004); *accord United States v. Arango,* 879 F.2d 1501 (7th Cir. 1989); *Rainey,* 197 S.W.3d 89. Other courts hold that arrestees are not recent occupants when they are beyond reaching distance from their vehicles. *See United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (suspect arrested 100-150 feet from vehicle); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (roughly thirty feet from vehicle); *United States v. Fafowora*, 865 F.2d 360, 361 (D.C. Cir. 1989) ("approximately one car length away, at the time of their arrest"). Even if this Court were to make clear it *is* necessary for an arrestee to be within reaching distance of his vehicle to constitute a "recent occupant," close factual disputes would still arise with some regularity respecting whether a person was actually within reach of his vehicle when arrested.

Nor is there any real predictability with respect to temporal proximity. Courts have deemed searches "contemporaneous" with arrests when police have

searched the arrestee's vehicle before arresting the suspect, *United States v. Smith*, 389 F.3d 944 (9th Cir. 2004), *cert. denied*, 544 U.S. 956 (2005); *State v. Mounds*, 840 A.2d 29 (Conn. App. Ct. 2004); "immediately" after the arrest, *McCrady*, 774 F.2d at 871-72; *Penman v. Commonwealth*, 194 S.W.3d 237, 241 (Ky. 2006); "shortly" after the arrest, *Sholola*, 124 F.3d at 810; fifteen minutes after the arrest, *Weaver*, 433 F.3d at 1106; and fifty minutes after the arrest, *United States v. Scott*, 428 F. Supp. 2d 1126, 1133 (E.D. Cal. 2006). On the other hand, other courts have deemed searches invalid when officers have conducted them "significantly after the arrest," *Strong v. State*, 138 S.W.3d 546, 555 (Tex. Crim. App. 2004), or thirty to forty-five minutes after the arrest, *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987).

Additional confusion arises when the police have removed the suspect from the scene before initiating or completing their search of his car. One court has deemed a search valid where the police removed the suspect five minutes before the search began. *McLaughlin*, 170 F.3d at 890-91. Another court has held that a search was valid where the suspect was driven away two and one-half minutes into a three-minute search. *United States v. Doward*, 41 F.3d 789 (1st Cir. 1994). A third court, however, has deemed a search invalid where an officer, who did not realize another officer had driven the arrestee off the premises, found contraband minutes after the arrestee's departure. *State v. Badgett*, 512 A.2d 160 (Conn. 1986).

The law with respect to timing, in short, now reads something like, 'well, thirty-minutes [sic] is too long,

but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant.' So much for bright lines." *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring).

The predictable result of this uncertainty—as exemplified by this case—is a highly fact-bound and inherently unstable patchwork of jurisprudence. *See United States v. Hrasky,* 453 F.3d 1099, 1102 (8th Cir. 2006) ("The precise context is important to the reasonableness of the search."), *cert. denied*, 127 S. Ct. 2098 (2007); *Scott*, 428 F. Supp. 2d at 1131 ("[I]t is necessary to look at the facts and circumstances of each case . . . ."); *Rainey*, 197 S.W.3d at 95 ("While there is no hard and fast definition of what constitutes 'recent' both in time and distance, *on the facts of this case*, Appellant was a 'recent occupant' and was sufficiently close to the vehicle, in both time and space, for the concerns of *Belton* and *Thornton* to be applicable.") (emphasis added).

And things are only getting worse. One district court, earnestly trying to make sense of *Belton* and *Thornton*, has held that "facts regarding spatial proximity alone . . . may establish a presumption of control over the vehicle," while "facts regarding temporal proximity, while not necessary to establish control, may nevertheless serve to rebut that presumption of control for purposes of determining whether the *Belton* rule should apply." *Mack v. City of Abilene*, 2005 WL 1149807, at *11 (N.D. Tex. May 12, 2005), *aff'd in part and vacated in part on other grounds*, 461 F.3d 547 (5th Cir. 2006). Another district court recently adopted a four-factor balancing

test in which no single factor is determinative. *United States v. Laughton*, 437 F. Supp. 2d 665, 672-73 (E.D. Mich. 2006). Such matrices of presumptions and burden-shifting directives are hardly the stuff of straightforward predictability. To the contrary, such *ex post*, fact-sensitive frameworks "plac[e] police officers in the position of making precisely the sort of *ad hoc* determinations *Belton*'s bright-line rule sought to avoid." *Hrasky*, 453 F.3d at 1107 (Gibson, J., dissenting).

B. This Court Should Make Clear, Consistent with Traditional Fourth Amendment Principles, That Officers May Not Conduct Exploratory Searches of Vehicles Incident to Arrests for Nothing More Than Traffic Offenses.

There is no need for this Court to perpetuate the current unsatisfactory state of affairs. Traditional Fourth Amendment principles provide ready alternatives to *Belton*'s legal fictions in cases—such as this one—that give rise to the vast majority of vehicular search-incident-to-arrest disputes. These doctrinal alternatives would not alter the outcomes of any of this Court's prior decisions, but they would coalesce to provide a truly workable and accessible rule, thereby relieving police officers in cases such as this of the need to make fact-bound inquiries and hairline distinctions at the scenes of arrests. That rule, simply stated, is that officers may not conduct warrantless searches of vehicles incident to arrests for nothing more than traffic offenses.[2]

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[2] As this brief uses the term "traffic offense," it includes violations of the "rules of the road" and regulations respecting licensing. It

1. As respondent ably argues, a straightforward application of the *Chimel* rule counsels an affirmance here. Under *Chimel*, "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States*, 376 U.S. 364, 367 (1964). Likewise, police may not search an arrestee's vehicle while he is secured at the station house because "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house." *Chambers v. Maroney,* 399 U.S. 42, 47 (1970). In short, the *Chimel*-driven inquiries of whether it is possible that the arrestee might grab evidence or a weapon from his vehicle should be made with respect to the time of the *search*, not the *arrest.* And if the arrestee is secured in police custody away from a given area, the police may not search that area incident to the arrest.[3]

This Court pledged in *Belton* that the doctrine adopted in that case "in no way alters the fundamental

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does not include more serious offenses committed while driving cars, such as driving under the influence or vehicular homicide. It also is worth noting that even if the police arrest someone for a traffic offense, it is well settled that they may search his vehicle if they have a reasonable belief, based on "specific and articulable [additional] facts," that the car contains weapons or other items that pose a genuine threat to safety. *See Michigan v. Long,* 463 U.S. 1032, 1049 (1983).

[3] The lower court cases the State cites at page 42 and 43 of its brief are therefore inconsistent with this Court's precedent and are nothing more than further evidence of the confusion that *Belton* has sown.

principles established in the *Chimel* case." *Belton,* 453 U.S. at 460 n.3. If that is so, then—contrary to the predominant understanding of the *Belton* doctrine—the police may not search an arrestee's vehicle while he is secured in police custody in the back seat of a squad car. Several state supreme courts, in fact, already apply *Chimel* to vehicular searches in this manner as a matter of state constitutional law. *See State v. Bauder,* 924 A.2d 38, 47 (Vt. 2007) (applying "traditional rule" of making *Chimel* inquiries at time of search); *State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("return[ing] to *Chimel*" and holding that state constitution requires its inquiries to be made at the time search is conducted); *Camacho v. State,* 75 P.3d 370, 374 (Nev. 2003) ("follow[ing]" traditional conception of *Chimel* to hold under state constitutional law that inquiries are made at the time of search); *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995) (question is whether arrestee can grab something in the "immediate area [he] occupies *during his custody*") (emphasis added).

As these courts all have recognized, when a person is handcuffed in the back seat of a patrol car, this Court can safely hold as a bright-line rule that he cannot reach anything inside his vehicle. And when the crime of arrest is nothing more than a traffic offense, there is no reason to believe that the arrestee's vehicle itself poses any safety risk such that it needs to be searched in connection with the arrest.

2. In his *Thornton* concurrence, Justice Scalia noted that numerous common law authorities, as well as early authorities from this Court and others, justified searches incident to arrest based simply on a

"general interest in gathering evidence relevant to the crime for which the suspect had been arrested." 541 U.S. at 629 (Scalia, J., concurring in the judgment). He thus suggested that if the holdings of *Belton* and *Thornton* make sense at all, it must be on the ground that officers there were entitled to search the arrestees' vehicles "because the car[s] might contain evidence relevant to the crime for which [they were] arrested." *Id.* Both arrestees, after all, were arrested for drug offenses, so it was arguably reasonable to believe that evidence related to those offenses might be found in the vehicles in which they had just been driving and which were still in the vicinity at the time of arrest. *Id.* at 632.

Recasting *Belton* in these terms—just like the alternative of clarifying that *Chimel* applies with respect to the arrestee's whereabouts when the officers conduct a search—also leads directly to a rule that officers are not allowed to conduct exploratory searches of vehicles incident to arrest for simple traffic offenses. As Justice Scalia explained:

> A motorist may be arrested for a wide variety of offenses; in many cases, there is no reasonable basis to believe relevant evidence might be found in the car. *See Atwater v. Lago Vista*, 532 U.S. 318, 323-34 (2001); *cf. Knowles v. Iowa*, 525 U.S. 113, 118 (1998). I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Id. at 632. Because there is no way that officers could reasonably believe that they might find evidence in an arrestee's vehicle relevant to any traffic violation,

conducting an exploratory search of an arrestee's vehicle incident to such an arrest would clearly violate this conception of the Fourth Amendment.

Some commentators—as well as some *amici* in this case—have begun to debate what level of suspicion would be necessary to trigger Justice Scalia's proposed "evidence gathering" rationale. To the extent that probable cause would be required, the proposal is fully consistent with the Fourth Amendment's current "automobile exception." *See California v. Carney,* 471 U.S. 386, 390-91 (1985); *Chambers,* 399 U.S. at 51. Although the United States criticizes the proposal on this ground (U.S. Br. 30) —as if this Court must strain to give the *Belton* doctrine, like a federal statute, some kind of independent force—the police have no freestanding "entitlement" to search vehicles incident to arrests. *Thornton,* 541 U.S. at 624 (O'Connor, J., concurring in part); *accord id.* at 627 (Scalia, J., concurring in the judgment). Indeed, consistency with other strands of constitutional jurisprudence is clearly desirable, not something to avoid. *See, e.g., People v. Blasich,* 541 N.E.2d 40, 43 (N.Y. 1989) (existence of automobile exception reinforces propriety of limitations on *Belton* doctrine). On the other hand, the proposal, as explained in *Thornton*, might be read to incorporate a lower and perhaps novel standard of suspicion.

This Court, however, need not, and should not, resolve that issue here. The vast majority of cases in which police officers contemplate arresting a motorist involve—just as this one does—nothing more than a traffic offense. And there is no reason whatsoever to believe that searching a vehicle could reveal evidence

of a traffic offense. Driving with a suspended license, speeding, driving with a broken tail light, failing to signal before turning, and other traffic offenses do not involve any material items that an officer might find in a car or anywhere else. On the other end of the spectrum, some motorists—such as the defendants in *Belton* and *Thornton*, who were arrested with drugs on the scene—are arrested for crimes and under circumstances that give rise at least to probable cause to believe that the vehicle contains evidence of the offense. Accordingly, an officer will seldom arrest a motorist with legitimate reason, though less than probable cause, to believe that searching his vehicle would reveal evidence of the crime of arrest. If and when such a case arises, this Court could consider on the basis of full briefing and an actual record what the level of suspicion the Constitution actually requires to search the vehicle. *Cf. Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 345-47 (1936) (Brandies, J., concurring) (better practice is to avoid deciding constitutional issues until they are squarely presented by facts of a case).

3. Prohibiting searches incident to arrests for traffic violations also has a substantial pedigree on its own terms. The "general rule" in the states prior to *Belton*, and prior to the Fourth Amendment's incorporation against the states, was that exploratory vehicular searches could not be justified solely on the basis of contemporaneous traffic arrests. *Pierce*, 642 A.2d at 961-62; *accord* P.A. Agabin, Annotation, *Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation*, 10 A.L.R.3d 314, 319-20 (3d ed. 1966) ("relatively well settled" that such "exploratory" searches were unreasonable). Officers

were permitted to search arrestees' vehicles only if "[p]robable cause in the form of an occurrence arising after arrest for a traffic violation [gave] rise to the arresting officer's belief that defendant ha[d] committed . . . another offense." *Id.* at 345.[4]

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[4] For examples of state cases holding that police officers could not search vehicles incident to arrests for traffic violations, see *State* v. *Anonymous*, 276 A.2d 448, 450 (Conn. Super. Ct. 1971) (holding a search of a vehicle incident to arrest unlawful because "[t]here are, of course, no 'fruits'" of operating an unregistered vehicle and "[t]he only instrumentality is the automobile itself"); *Commonwealth* v. *Dussell*, 266 A.2d 659, 661 (Pa. 1970) (concluding that the government could not justify a warrantless search of an automobile simply as incident to arrest for running a red light and failure to have proof of registration); *Virgil* v. *Superior Court, Placer County*, 73 Cal. Rptr. 793, 796 (Cal. Ct. App. 1968) (holding that a search incident to arrest for reckless driving did not justify search of car because the arrestee was "arrested for a traffic violation; nothing more" and the "search could have had no relation to the traffic violation") (quotation omitted); *People* v. *Marsh*, 228 N.E. 2d 783, 792 (N.Y. 1967) (concluding that there are "no 'fruits' or 'implements'" of traffic offenses "except in the most rare of instances"); *State* v. *Call*, 220 N.E. 2d 130, 136 (Ohio Ct. App. 1965) ("The officers had no right to search for or seize the other articles . . . as an incident to the arrest for speeding, because there are no fruits of the crime of speeding and the automobile was the means of committing the offense."); *State* v. *Scanlon*, 202 A.2d 448, 452 (N.J. Super. Ct. App. Div. 1964) (concluding that "motor vehicle violations . . . are not such offenses, in themselves, which raise the kind of inferences which justify searches"); *State v. Harris*, 121 N.W.2d 327, 333 (Minn. 1963) (holding that "[p]olice officers may not ordinarily make searches upon apprehending motorists for simple traffic violations"); *People v. Mayo*, 166 N.E.2d 440, 441 (Ill. 1960) (agreeing that "[t]he power of the police to search and seize at will, merely because a traffic ordinance or law has been violated, does violence to constitutional concepts of security based upon the inviolability of the person and his effects") (quotation omitted); *People v. Zeigler*, 100 N.W.2d 456, 460 (Mich. 1960) (holding that

Indeed, at least one state, after an exhaustive analysis in a case involving driving with a suspended license, has continued to follow this rule on state

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a search incident to arrest for a traffic violation is illegal in absence of probable cause); *People* v. *Gonzales*, 97 N.W.2d 16, 20 (Mich. 1959) (holding that "[t]here were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed" when arrest was for defective headlight); *Travers v. United States*, 144 A.2d 889, 891 (D.C. App. 1958) (finding that the search could not be justified as one aimed at discovering the "fruits and evidence" of the crime because there are no fruits and evidence of traffic violations); *People v. Molarius*, 303 P.2d 350, 351-52 (Cal. Ct. App. 1956) (supressing evidence where search "bore no relation to the traffic violation . . . upon which appellants were booked"); *Brinegar v. State*, 262 P.2d 464, 480-81 (Okla. Crim. App. 1953) (holding that "not every arrest of a motorist for a traffic violation would justify a search of the seats and glove compartment for weapons" and that "[t]here must be facts and circumstances observed by the officers to cause them in good faith to believe that the motorist is armed, is dangerous, or apparently intends to escape"); *Elliot v. State*, 116 S.W.2d 1009, 1012 (Tenn. 1938) (holding that arresting officer's authority to search and seize is limited to "offensive weapons and tools of escape and . . . evidence of guilt of the offense for which the lawful arrest has been made" and that the search at issue "had no reasonable relation" to the reckless driving offense).

Federal courts during this era issued similar decisions. *See Grundstrom* v. *Beto*, 273 F. Supp. 912, 916 (N.D. Tex. 1967) (holding search incident to arrest for operating a vehicle with a loud muffler is unjustified because "[t]he search of the interior of a motor vehicle bears no relation to seeking the means by which a traffic offense was committed"), *appeal dismissed* 404 F.2d 644 (5th Cir. 1968); *United States* v. *One 1964 Cadillac Hardtop*, 224 F. Supp. 210, 212 (E.D. Wis. 1963) (concluding that "a minor traffic violation will not generally justify a search of the vehicle and its passengers"); *United States* v. *Tate*, 209 F. Supp. 762, 765 (D. Del. 1962) (concluding that a search incident to arrest for speeding "could not have been . . . for the fruits of the crime [of arrest]—there are no fruits of speeding").

constitutional grounds. *See Pierce*, 642 A.2d at 953-58. The New Jersey Supreme Court reasoned in that case that:

> [I]n the context of arrests for motor-vehicle violations, the bright-line *Belton* holding extends the *Chimel* rule beyond the logical limits of its principle. We reject not the rationale of *Chimel*, but *Belton*'s automatic application of *Chimel* to authorize vehicular searches following all arrests for motor-vehicle offenses.

Id. at 960.

The mid-century understanding of the right against unreasonable searches and seizures also prohibited the use of an arrest for a traffic offense as "a pretext to search for evidence" of some other suspected crime. Annotation, 10 A.L.R.3d at 322 (collecting several cases). When there is "no reason to believe that anything more than a traffic violation ha[s] occurred," officers should not have an incentive to use a traffic arrest as justification for conducting a "broader vehicle search[] than any neutral magistrate could authorize by issuing a warrant." *Robbins*, 453 U.S. at 451-52 (Stevens, J., dissenting). Barring automatic searches incident to arrests for traffic offenses removes the "unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.'" *Pierce,* 642 A.2d at 961 (quoting 3 LaFave, *supra*, § 7.1(c), at 21).

This case provides a perfect illustration. As the State acknowledges, the police initiated contact with respondent because they received "an anonymous tip

that narcotics activity was occurring at a particular house." Petr. Br. 4. But because the tip was completely unverified, the officers' suspicion that respondent or anyone else at the residence was involved in drug trafficking fell far short of probable cause. When the officers returned to the residence a second time to investigate, they used respondent's apparent traffic violation as an excuse to arrest him and to comb through the interior of his vehicle. That the officers happened to find evidence of narcotics activity during this search should not distract the Court from the reality that they conducted a pretextual search on a level of suspicion that presumably frequently fails to turn up any evidence of criminality.

4. Finally, prohibiting searches incident to arresting motorists for traffic violations would bring the *Belton* doctrine into conformity with this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *Knowles* held that officers may *not* conduct a search incident to issuing a *citation* for a traffic violation (in that case, speeding), in part because no evidence of such a violation can exist in the passenger compartment of the car. *Id.* at 118.

Knowles thus leaves officer safety as the only possible justification for continuing to allow searches incident to *arrests* for such violations. But as this case demonstrates, officers are *less* at risk when they arrest motorists for traffic violations than when they issue citations for such violations. Respondent was handcuffed in the back seat of a patrol car during the entire time the officers searched his car, and then he was taken directly to the police station. Only if the officers had let respondent go with a citation would he

have gained access to his vehicle and had any ability to threaten the officers. Hence, the State's argument that the Fourth Amendment actually gave the officers the authority to search respondent's car because they decided *not* to let respondent go with a citation "illuminates the absurdity associated with allowing purely exploratory searches incident to arrest," at least when there is no possibility that evidence relevant to the crime of the arrest will be found in the vehicle. *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring). This Court should decline to indulge that absurdity.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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